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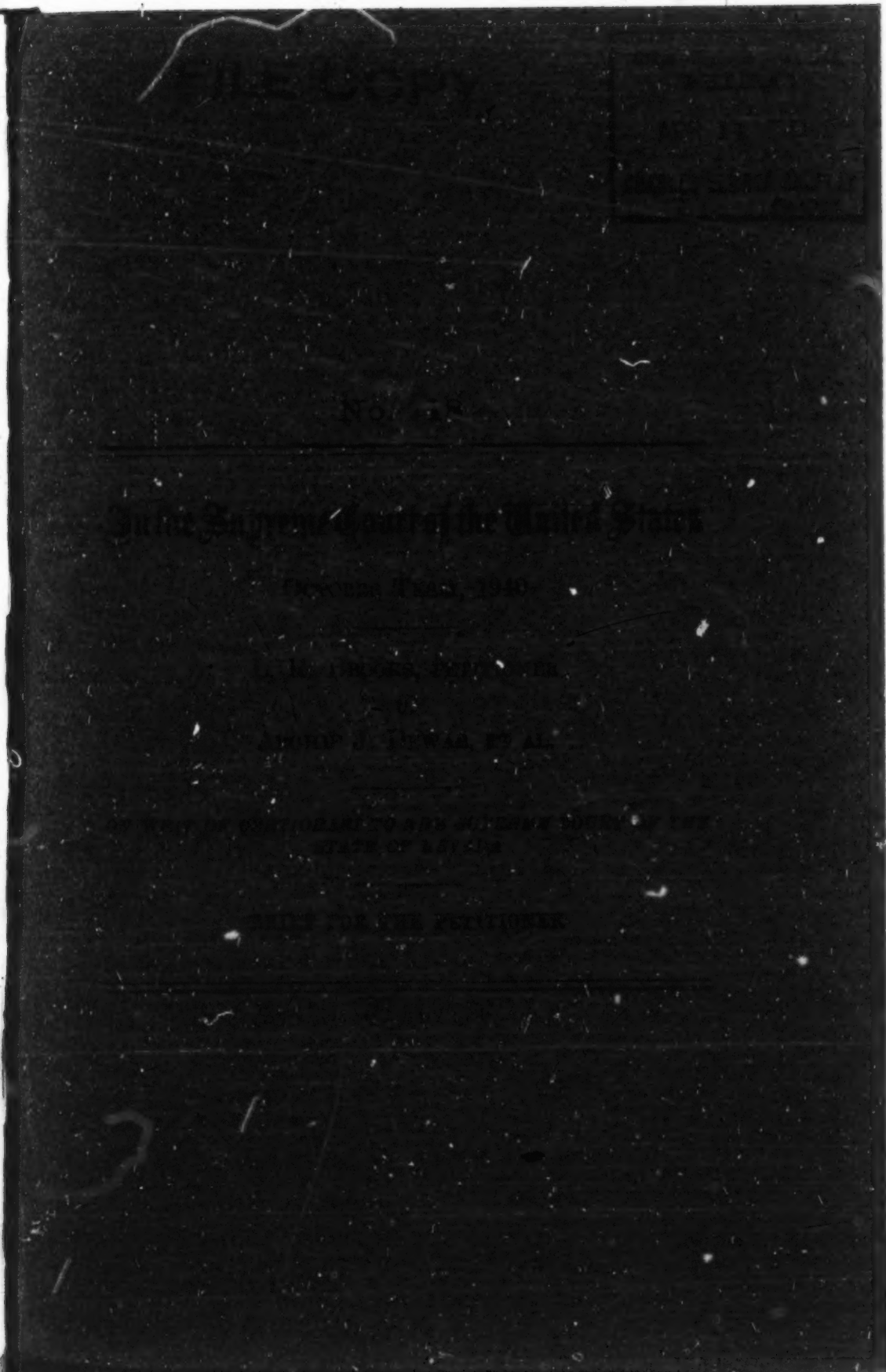

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 718

L. R. BROOKS, PETITIONER

v.

ARCHIE J. DEWAR, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (R. 42–57) is reported in 106 P. 2d 755. The district court did not write an opinion.

JURISDICTION

The judgment of the Supreme Court of Nevada was entered on October 24, 1940 (R. 57–58). The petition for a writ of certiorari was filed on January 24, 1941, and was granted on March 10, 1941. The jurisdiction of this Court rests on Section

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237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED[1]

The Secretary of the Interior, pending the collection of data necessary for the issuance of grazing permits under Section 3 of the Taylor Grazing Act, prescribed regulations requiring temporary grazing licenses, to be issued for a low uniform fee. Respondents brought suit to enjoin the Regional Grazier from enforcing this regulation and from barring their livestock from the public range. The questions are:

1. Whether the suit is brought against the United States.

2. Whether the Secretary of the Interior is an indispensable party.

3. Whether the state courts have jurisdiction to enjoin the actions of a federal official.

4. Whether the Secretary of the Interior under Section 2 of the Taylor Grazing Act has authority to require the temporary licenses and to charge the fee.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269 (R. 15–23), as amended by the Act of June 26, 1936, c. 842,

[1] The questions vary from the form used in the petition, and conform to the arrangement of this brief. It is believed there has been no change of substance except for the addition of the third question (see n. 46, p. 35, *infra*).

49 Stat. 1976, and of the regulations of the Secretary of the Interior issued thereunder (R. 23–27), are printed in the Appendix.

STATEMENT

Prior to 1934 settlers in the West enjoyed an implied and unrestricted license to graze livestock on the public domain free of charge. *Buford* v. *Houtz,* 133 U. S. 320, 326. This unregulated use of the public lands of the United States resulted in numerous abuses [2] which led to the adoption of the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269, 43 U. S. C., Secs. 315 *et seq.,* an Act designed, as its title indicates, "To stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, [and] to stabilize the livestock industry dependent upon the public range".

This Act is a comprehensive statute, requiring the Secretary of the Interior to ascertain which public lands (out of a total of 173,000,000 acres in the western states) [3] are "chiefly valuable for grazing and raising forage crops" and from such lands to designate grazing districts embracing not to ex-

[2] H. Rept. No. 903, 73d Cong., 2d Sess. (1934); Sen. Rept. No. 1182, 73d Cong., 2d Sess. (1934); 78 Cong. Rec., pt. 6, p. 6358 (1934); *ibid.*, pt. 10, p. 11139.

[3] Hearings, H. Committee on Public Lands, H. R. 2835, 73d Cong., 1st Sess., and H. R. 6462, 73d Cong., 2d Sess. (1934), pp. 6, 7, 18.

ceed 142,000,000 acres.[4] Once these districts are established, the Secretary is directed, by Section 2, to "make provision for the protection, administration, regulation, and improvement of such grazing districts" and to "do any and all things necessary to accomplish the purposes of this Act." In carrying out the Act the Secretary is authorized, under Section 3, to issue term permits "to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time." In issuing these permits preference is to be given "to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them." All permits are to be renewed if their denial will "impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan."

After establishing the grazing districts contemplated by the Act, and pending the collection of information prerequisite to the issuance of the term permits authorized by Section 3, the Secretary of the Interior, acting under Section 2, promulgated

[4] Amendatory Act of June 26, 1936, c. 842, 49 Stat. 1976.

regulations setting up a system of temporary licenses and uniform fees. This system was not to be permanent. The regulations provide (R. 23):

> Permits within the meaning of section 3 of the act of June 28, 1934 (48 Stat. 1269), shall be issued as soon as the necessary data are available upon which to ascertain the proper use of the lands and water which entitle their owners, occupants or lessees to a preferential grazing privilege.[5]
>
> During the intervening period, temporary licenses will be issued under authority of section 2 of said act to provide for the existing livestock industry using the public lands in such districts.

Believing that the Secretary lacked authority to issue temporary licenses, as distinguished from term permits, and to charge uniform fees therefor, some forty persons who are engaged in the business of grazing livestock in Nevada, instituted the present suit in the state court against L. R. Brooks, the Acting Regional Grazier of the United States for Region Three, to enjoin him from enforcing the licensing and fee provisions prescribed by the Secretary's regulations of March 2, 1936. The complaint alleges that the Act gives the Secretary no authority to require temporary, revocable licenses, that the Secretary has no authority to charge fees for such licenses, and that the grazing fees required

[5] Cf. 43 Code of Federal Regulations, sec. 501.1 (c).

by the regulations were fixed without any attempt to determine what would be a reasonable fee in each case (R. 8–9). Brooks demurred on the grounds (1) that the complaint does not state a cause of action; (2) that the suit is one against the United States to which it has not consented; and (3) that the Secretary of the Interior is an indispensable party and has not been joined (R. 31).[6]

The demurrer was overruled and, upon Brooks' failure to answer further, judgment was entered enjoining him "from barring, or threatening to bar, plaintiffs from grazing their livestock upon the public range" in Nevada "in default of payment of the grazing fee * * * and in default of obtaining a * * * temporary license" prescribed by the departmental rules and regulations (R. 35). The Supreme Court of Nevada affirmed (R. 57). It held that the suit was not one against the United States, and that the Secretary was not an indispensable party (R. 50). After expressly refusing to decide whether Section 2 of the Taylor Grazing Act authorizes the issuance of temporary licenses or the charging of grazing fees (R. 56), the court held that in any event fees could not "legally be based

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[6] Prior to the filing of this demurrer, the Government tried without success to remove the case to the federal courts (*Dewar* v. *Brooks*, 16 F. Supp. 636) and to enjoin further proceedings in the state courts (*United States* v. *Dewar*, 18 F. Supp. 981).

upon the uniform rate prescribed by the Rules of March 2, 1936" (R. 57).

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Nevada erred:

1. In holding that the United States is not an indispensable party to a suit brought by stockmen in Nevada to enjoin the Regional Grazier from requiring them to obtain temporary licenses in order to graze their livestock on the public range in that state.

2. In holding that the Secretary of the Interior is not an indispensable party to a suit brought to enjoin his subordinate from enforcing departmental rules and regulations promulgated by the Secretary himself.

3. In affirming a decree which enjoined the Regional Grazier from enforcing the rules and regulations of the Department of the Interior, and from barring the livestock of the respondents from the public lands of the United States unless they complied with those rules and regulations.

4. In holding that the Secretary of the Interior, pending the collection of necessary data for the issuance of term permits, lacks authority under the Taylor Grazing Act to charge a low uniform fee for temporary licenses issued to persons grazing livestock on public lands within grazing districts established under that Act.

SUMMARY OF ARGUMENT

I

The Nevada state courts were without power in this case to determine the validity of the Grazing Rules of March 2, 1936.

A. The suit was brought against the United States, which has not consented to be sued. The complaint did not seek to defend respondents' property rights against wrongful invasion, but sought only to secure free access for their livestock to the public lands of the United States. The prayer and the effect of the decree was to afford relief against the United States, and the suit therefore must fail. (1) The complaint sought to interfere with the Government's possession and use of its property. (2) It attempted to interfere with the functions of the Government, in the administration of its public lands. (3) It was brought against the petitioner only in his official capacity. (4) While the decisions of this Court are far from consistent, the respondents can bring their case within none of the exceptions which have been introduced into the foregoing rules.

B. The Secretary of the Interior is an indispensable party and has not been joined. (1) The question seems plainly to be one of federal rather than state law, since upon its determination rests the manner in which the functions of the Department of the Interior may be enjoined and the nature and extent of the officer's liabilities. (2) It is not so

clear, if the suit is not laid against the United States, and if the respondents can obtain all they ask by restraint of the local officer, that the Secretary must be joined. The authorities are in conflict. *Gnerich* v. *Rutter*, 265 U. S. 388; *Colorado* v. *Toll*, 268 U. S. 228. The considerations of policy point in both directions. But we think the balance lies fractionally on the side of a ruling that the Secretary is an indispensable party.

C. The state courts of Nevada, in any event, were without power to enjoin the activities of a federal officer. It is settled that state courts have no power to interfere with the functions of the federal courts, to issue writs of habeas corpus to prisoners in federal custody, to issue writs of mandamus to federal officers, or to enjoin the collection of federal taxes. By the same token, they are without power to enjoin a federal officer in the performance of his duties. Jurisdiction is not conferred by the fact that he is alleged to act without authority. *Tarble's Case*, 13 Wall. 397.

II

A. (1) Section 2 of the Taylor Grazing Act, unless limited by Section 3, clearly authorizes the temporary license and fee system established by the Rules of March 2, 1936, because a comparable licensing system based on similar language in the Forest Reserve Act has been upheld by this Court in *United States* v. *Grimaud*, 220 U. S. 506, and in *Light* v. *United States*, 220 U. S. 523.

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(2) The broad grant of authority conferred in mandatory terms by Section 2 is not restricted by the permissive authority to carry out the permit provisions of Section 3. Some temporary system had to be devised to carry out the legislative intent while the necessary data was being assembled on which to base a system of long-term permits authorized by Section 3. A hasty and improper issuance of term permits without adequate information regarding prior use and existing range capacity could have disastrous consequences. If too many were issued, the evils which the Act was designed to remedy, such as overgrazing, soil erosion, and range destruction would be continued and even aggravated. On the other hand, if too few were issued the livestock industry dependent on the public range would be disrupted if not destroyed. Nor could the Secretary properly accomplish the purposes of the Act if he were to make no effort to control grazing until the permanent system was established. The court below should therefore have avoided the construction which forbade the temporary licenses authorized by Section 2 and made the Act unworkable. The construction placed on Sections 2 and 3 of the Taylor Grazing Act by the administrative agency "charged with the responsibility of setting its machinery in motion" is entitled to great weight and should not be lightly disturbed by the courts. *Norwegian Nitrogen Co. v. United States,* 288 U. S. 294, 315.

B. The question whether the Taylor Grazing Act, as originally enacted, authorized the regulations now complained of is largely academic, because Congress in no less than three ways has ratified or approved the system of temporary licenses and uniform fees prescribed by the Rules of March 2, 1936. (1) Congress, knowing that permits were not being issued and that fees were being charged for temporary licenses, has made annual appropriations for range improvements on the basis of such collections. (2) Congress in June of 1936 virtually reenacted the Taylor Grazing Act by extending its provisions to another 62,000,000 acres of the public domain, and thus evidenced approval of the regulations promulgated in the interim. (3) Finally, in the Soldiers' and Sailors' Civil Relief Act of October 17, 1940, Congress provided for the temporary suspension of "permits and licenses" under the Taylor Grazing Act, and thus recognized and approved the hybrid system of licenses and permits now used by the Division of Grazing.

ARGUMENT

I

THE SUIT CANNOT BE MAINTAINED FOR WANT OF JURISDICTION AND OF INDISPENSABLE PARTIES

The Supreme Court of Nevada, as we show below, erroneously held that the Taylor Grazing Act did not authorize the Director of Grazing and the Secretary of Interior to prescribe the uniform

fees provided in the Grazing Rules of March 2, 1936. But the Court is also faced with serious questions as to the right of the Nevada courts to entertain this action. We urge (a) that there was no jurisdiction, because the suit is in fact against the United States, (b) that the suit perhaps should be dismissed because the Secretary of the Interior is an indispensable party, and (c) that the state courts are without power to enjoin the official acts of a federal officer.

A. THE SUIT IS AGAINST THE UNITED STATES WHICH HAS NOT CONSENTED TO BE SUED

The court below held, without elaboration, that this suit was not one brought against the United States (R. 50). This ruling was error.

None has ever questioned that the United States is immune from a suit to which it has not consented.[7] The exceedingly voluminous litigation, and the not wholly consistent rulings of this Court,[8] have reflected difficulty not in the rule but in its application. See *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9. In this suit, however, we think that the presence of the United States as the real party defendant appears with unmistakable clarity, and the question accord-

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[7] *The Federalist*, No. 81; *Hans* v. *Louisiana*, 134 U. S. 1, 11–19; *Williams* v. *United States*, 289 U. S. 553, 573–577; *Monaco* v. *Mississippi*, 292 U. S. 313, 321–323.

[8] Mr. Justice Miller, more than 50 years ago, noted that "the questions raised have rarely been free from difficulty" and that it is not "an easy matter to reconcile all the decisions of the court in this class of cases." *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 451. His statement applies with redoubled force today.

ingly presents less difficulty than is ordinarily the case.

The complaint filed by respondents in the state court sought to enjoin the petitioner, Acting Regional Grazier of the United States, from enforcing grazing regulations promulgated by the Director of Grazing with the approval of the Secretary of the Interior (R. 2). It prayed that respondents be allowed to graze their livestock on the public range without payment of the license fees required by the Grazing Rules of March 2, 1936, and that the court decree that the Director of Grazing and the Secretary of the Interior had no authority to prescribe in the Rules that the fees be charged (R. 14). The state court entered a perpetual injunction in accord with the prayer (R. 34–35).

The complaint and the decree quite evidently operate in truth against the United States as well as the petitioner. It is immaterial that the United States is not named as a party defendant.[9] And it

[9] Early decisions held that this might be the only question. *Osborn* v. *United States Bank*, 9 Wheat. 738, 858–859; *Davis* v. *Gray*, 16 Wall. 203, 220. But the rule has since been settled that the absence of the Government as a formal party defendant is immaterial if the suit is in reality directed against the sovereign. *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Poindexter* v. *Greenhow*, 114 U. S. 270, 287; *Hagood* v. *Southern*, 117 U. S. 52, 67; *In re Ayers*, 123 U. S. 443, 487–492; *Belknap* v. *Schild*, 161 U. S. 10, 25; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386; *Oregon* v. *Hitchcock*, 202 U. S. 60, 68–69; *Louisiana* v. *McAdoo*, 234 U. S. 627, 629; *Ex parte State of New York, No. 1*, 256 U. S. 490, 500; *Worcester County Co.* v. *Riley*, 302 U. S. 292, 296.

is not controlling that the petitioner was alleged to be acting without authority in the statute.[10] It is, instead, well settled that whether the suit is against the United States is determined by the effect of the decree.[11] It seems necessarily to follow that the respondent's complaint is in reality directed against the Government itself, because (1) it seeks to interfere with the possession and use of Government property, (2) it interferes with the functions of the Government, (3) it is brought against the petitioner only in his official capacity, and (4) it does not fall within any of the exceptions to the general rule of sovereign immunity from suit.

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[10] Without such an allegation, of course, there could be no question of relief against the officer. *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 21; *Hurley* v. *Kincaid*, 285 U. S. 95, 104; *Worcester County Co.* v. *Riley*, 302 U. S. 292, 297; *Crozier* v. *Krupp*, 224 U. S. 290. But it has long been settled that a suit against the Government cannot be entertained through the expedient of suing the officer and alleging that he acts without proper authority. *Cramp & Sons* v. *Curtis Turbine Co.*, 246 U. S. 28, 40. In the following decisions, for example, the Court held the suit to be against the Government, although it was alleged that the officer's conduct was without authority in the constitution or the statute: *Louisiana* v. *Jumel*, 107 U. S. 711, 720–723; *Hagood* v. *Southern*, 117 U. S. 52, 67–68; *Oregon* v. *Hitchcock*, 202 U. S. 60, 69–70; *Naganab* v. *Hitchcock*, 202 U. S. 473, 475; *Louisiana* v. *Garfield*, 211 U. S. 70, 77–78; *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222; *Louisiana* v. *McAdoo*, 234 U. S. 627, 632–634; *Lankford* v. *Platte Iron Works*, 235 U. S. 461, 476; *New Mexico* v. *Lane*, 243 U. S. 52, 58; *Morrison* v. *Work*, 266 U. S. 481, 485–488.

[11] *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Worcester County Co.* v. *Riley*, 302 U. S. 292, 296.

1. *The Complaint Seeks to Interfere With the Government's Possession and Use of Its Property.*—By their complaint the respondents sought, without the payment of the prescribed fees, to use the public lands of the United States to satisfy their grazing requirements (R. 3). They sought, not to protect their property from invasion by the Government, but to avoid liability for trespassing on the property of the United States (R. 8). They prayed that the petitioner "be perpetually enjoined from barring, or threatening to bar, plaintiffs from grazing their livestock upon the public range" (R. 14). This relief was given them by the judgment (R. 35).

It needs no argument to show that the complaint quite frankly seeks to interfere with the possession and use by the United States of its property. Respondents ask only one thing: free access to the public lands of the United States. The complaint does not allege any right of ownership or possession in the respondents.[12] Even in cases where the United States has only an opposing claim to the property, it has often been ruled that the question may not be resolved by suit against its officer.[13] *A fortiori,*

[12] We show below (pp. 44–45) that the implied grazing license of respondents was terminated in 1934; the complaint makes no categorical claim that the implied license continued after May 31, 1935 (R. 4).

[13] *Carr* v. *United States*, 98 U. S. 433, 438; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457; *Christion* v. *Atlantic & N. C. Railroad*, 133 U. S. 233, 241; *Stanley* v. *Schwalby*, 162 U. S. 255, 270, 283; *Oregon* v. *Hitchcock*, 202 U. S. 60, 70; *Naganab* v. *Hitchcock*, 202 U. S. 473, 476; *Louisiana* v. *Garfield*, 211 U. S. 70, 77–78; *Hopkins* v. *Clem-*

when the Government has title to and possession of the property, suit will not lie against its officer to control its disposition,[14] to direct its administration,[15] or to forbid its use.[16] This case represents a still more extreme demand, for the respondents seek by court injunction against the official to obtain use for themselves of Government property. As the Court said in *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222, "The United States is the owner in possession * * *. It cannot be interfered with behind its back and, as it cannot be made a party, this suit must fail."

2. *The Complaint Seeks to Interfere with the Functions of Government.*—The same conclusion results if one adopts an alternative approach. The object of the complaint is to enjoin the enforcement of regulations governing grazing on the public lands (R. 2). It sets out the economic dependence

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son College, 221 U. S. 636, 648–649; *New Mexico* v. *Lane*, 243 U. S. 52, 58; *Ex parte State of New York, No. 2*, 256 U. S. 503, 510–511; *Morrison* v. *Work*, 266 U. S. 481, 485; *Leather* v. *White*, 266 U. S. 592; *Work* v. *Louisiana*, 269 U. S. 250, 260–261.

[14] *Oregon* v. *Hitchcock*, 202 U. S. 60, 70; *Lankford* v. *Platte Iron Works*, 235 U. S. 461, 476; *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222.

[15] *Louisiana* v. *Jumel*, 107 U. S. 711, 722; *Naganab* v. *Hitchcock*, 202 U. S. 473, 475; *Morrison* v. *Work*, 266 U. S. 481, 485–486, 488.

[16] *Belknap* v. *Schild*, 161 U. S. 10, 18, 25; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 605–606; see *James* v. *Campbell*, 104 U. S. 356, 358–359; *Hollister* v. *Benedict Mfg. Co.*, 113 U. S. 59, 67–68.

of the livestock raisers upon the public lands (R. 3–5), the prior practice of unlicensed use and of temporary, costless licenses for the use of the public lands (R. 5–6), and the conferences as a result of which the Department of the Interior decided to charge the uniform minimum fees here attacked (R. 6–7, 9). The prayer for relief seeks free access for respondents' livestock to the public grazing lands of the United States (R. 14). Quite evidently, the respondents seek through their suit to control the regulations which the Government prescribes for the use of Government property.

It is settled that the courts have no power by decrees against the officer to control the manner in which the Government is to perform its functions or administer its property.[17] The courts may not "take upon themselves the administration of the land grants of the United States." *Oregon* v. *Hitchcock*, 202 U. S. 60, 70. For "To interfere with its management and disposition of the lands * * * would interfere with the performance of governmental functions and vitally affect interests of the United States. It is, therefore, an indis-

[17] *Louisiana* v. *Jumel*, 107 U. S. 711, 722; *North Carolina* v. *Temple*, 134 U. S. 22, 30; *New York Guaranty Co.* v. *Steele*, 134 U. S. 230, 232; *In re Ayers*, 123 U. S. 443, 502–506; *Belknap* v. *Schild*, 161 U. S. 10, 18; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 605–606; *Naganab* v. *Hitchcock*, 202 U. S. 473, 475; *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222; *Lankford* v. *Platte Iron Works*, 235 U. S. 461, 476.

pensable party to this suit." *Morrison* v. *Work*, 266 U. S. 481, 485–486.[18]

3. *The Suit Is Brought Against Petitioner in His Official Capacity.*—A third way to express the fact that this suit is in reality brought against the United States is to note that the complaint was filed against the petitioner only in his official capacity.

The complaint, it is true, is sedulously silent on the capacity in which it impleads the petitioner. It mentions neither a personal nor an official capacity, and it prays no relief against his successors. But it describes the petitioner as "Acting Regional Grazier of the United States for Region Three" (R. 2). It nowhere mentions any individual interest petitioner might have in excluding respondents' livestock from the range. Petitioner's threatened offense is simply the enforcement of the Grazing Rules (R. 2, 10, 11, 13, 14). The lengthy recitals of the complaint are all directed at the action of the Director of Grazing, approved by the Secretary (R. 5–10). The petitioner, too obviously for argument,

[18] In *Louisiana* v. *McAdoo*, 234 U. S. 627, the State sought to enjoin the Secretary of Treasury from collecting a duty on imported sugar which under the tariff acts was too low. The Court denied leave to file the bill, on grounds equally applicable here. It said (p. 632): "Obviously such suits to review the official action of the Secretary of the Treasury in the exercise of his judgment as to the rate which should be exacted under his construction of the Tariff Acts would operate to disturb the whole revenue system of the Government and affect the revenues which arise therefrom. Such suits would obviously, in effect, be suits against the United States."

is sued only in his official capacity. Many decisions of this Court have found evidence that the suit was against the Government in the fact that the officer had no personal interest and was sued only in his official capacity.[19] The present case falls within the same rule.

4. *This Case Comes Within None of the Exceptions to the General Rule.*—The analysis we have presented shows, with unmistakable clarity, that this suit is in truth directed at the United States. We have, however, no hesitation in confessing that it presents the state of the law with misleading simplicity. The decisions of this Court are, we believe, entirely beyond reconciliation in many aspects of the recurrent problem whether a suit is brought against the Government.[20] But, whatever the ultimate need of clarification, this case does not seem to

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[19] *Governor of Georgia* v. *Madrazo*, 1 Pet. 110, 123–124; *Louisiana* v. *Jumel*, 107 U. S. 711, 720; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457; *Hagood* v. *Southern*, 117 U. S. 52, 69; *In re Ayers*, 123 U. S. 443, 489, 493; *New York Guaranty Co.* v. *Steele*, 134 U. S. 230, 232; *Belknap* v. *Schild*, 161 U. S. 10, 25; *Smith* v. *Reeves*, 178 U. S. 436, 439; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *Wells* v. *Roper*, 246 U. S. 335, 337; *Ex parte State of New York, No. 1*, 256 U. S. 490, 501; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 605; *Oregon* v. *Hitchcock*, 202 U. S. 60, 69; *Naganab* v. *Hitchcock*, 202 U. S. 473, 475.

[20] The contrariety of decision seems to reflect the volume of litigation, combined with, on the one hand, the clarity of the general rule of immunity, and, on the other hand, the undoubtedly harsh consequences of ruling that the citizen is remediless against distasteful acts of his Government.

afford an occasion for choice among the alternative rules which frequently may be invoked to determine whether or not a suit is directed at the Government. For it is covered by none of the exceptions which from time to time have been introduced into the general rule that the United States may not be impleaded by suit against its officer.

The cases in which a suit against the government officer have been allowed fall into several reasonably well-defined categories.[21] Where the plaintiff has admitted title to and possession of the property, he has been allowed to resist its wrongful invasion by a government officer.[22] These cases have been ex-

[21] *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135, 151–152, and *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163, on the face of the opinions would present difficulty if they were to be fitted into the the following classification. But Section 10 of the Federal Control Act (c. 25, 40 Stat. 451), other parts of which are quoted by Chief Justice White (250 U. S. at 146) expressly provides that "no defense shall be made * * * upon the ground that the carrier is an instrumentality or agency of the Federal Government."

[22] Damages: *The Flying Fish*, 2 Cranch. 170, 178–179; *Scott* v. *Donald*, 165 U. S. 58, 67–70; *Hopkins* v. *Clemson College*, 221 U. S. 636, 643–644. Injunction: *In re Tyler, Petitioner*, 149 U. S. 164, 190; *Allen* v. *Baltimore & Ohio Railroad Company*, 114 U. S. 311, 314–317; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 110; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619–620.

Colorado v. *Toll*, 268 U. S. 228, is properly classified under this head. The Court allowed a bill to enjoin the Superintendent of the Rocky Mountain Park from enforcing a regulation forbidding the carriage of passengers for hire except by the Park concessionaire. But the roads had been built by the State and its counties, before the Park was laid out, under R. S. Section 2477, which granted "The right of way

tended to permit the plaintiff to challenge the officer's right of possession of property claimed by the plaintiff.[23] And an individual may restrain unwarranted interference with his rights of property which have advanced almost to the point of a fee title, and where none but he could claim an equitable interest in the property, although it remains in the possession of the Government.[24] Correlatively, the plaintiff has been allowed to recover back his property which is held by the officer separate from the

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for the construction of highways over public lands." The State alleged (No. 234, October Term, 1924; R. 3) jurisdiction over and the right to use the roads, and argued that its ownership and control of the highways (Br. 21–28) brought it within the cases permitting defense against a wrongful invasion of property (Br. 17–20). The Government did not urge that the suit was laid against the United States (cf. Br. 12–14).

[23] *Cammeyer* v. *Newton*, 94 U. S. 225, 234; *United States* v. *Lee*, 106 U. S. 196, 209–223; *Stanley* v. *Schwalby*, 162 U. S. 255, 283; *Tindal* v. *Wesley*, 167 U. S. 204, 211–222; *Scranton* v. *Wheeler*, 179 U. S. 141, 152–153; cf. *Wells* v. *Nickles*, 104 U. S. 444, 446–447. As explicitly pointed out in the *Lee* (106 U. S. at 222), *Stanley* (162 U. S. at 271–272), *Tindal* (167 U. S. at 223–224) and *Scranton* (179 U. S. at 152) cases, the judgment cannot conclude the title of the Government. *Carr* v. *United States*, 98 U. S. 433, 439; *Hussey* v. *United States*, 222 U. S. 88, 93.

[24] *Garfield* v. *Goldsby*, 211 U. S. 249, 260–261; *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228, 234–237, 238; *Payne* v. *New Mexico*, 255 U. S. 367; *Santa Fe Pac. R. R. Co.* v. *Fall*, 259 U. S. 197, 198–199. The Secretary of the Interior, in *Santa Fe Pac. R. R. Co.* v. *Lane*, 244 U. S. 492, 497–498, did not resist the plaintiff's title but his insistence upon excessive surveying fees yet prevented the plaintiff's rights from ripening into possession and fee.

property or funds of the Government,[25] or to enjoin its disposition by the Government in a manner which would defeat his rights.[26] There has been held to be a corresponding power to resist the wrongful invasion of the plaintiff's personal rights.[27] A plain, ministerial duty to act in accordance with the statute may be compelled.[28] And in a good number of cases the plaintiff has been allowed by injunction suit against the officer to challenge the validity of regulatory statutes or regulations,[29] in the outcome of which the Government can have no interest if the command be invalid.[30]

[25] *The Flying Fish*, 2 Cranch. 170, 178–179; *United States* v. *Peters*, 5 Cranch. 115, 139–140; *Osborn* v. *United States Bank*, 9 Wheat. 738, 858–859; *Davis* v. *Gray*, 16 Wall. 203, 220–221; *Poindexter* v. *Greenhow*, 114 U. S. 270, 287–297.

[26] *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9–18; *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 171–172; *Lane* v. *Watts*, 234 U. S. 525, 540; *Work* v. *Louisiana*, 269 U. S. 250, 254, 261. *Ickes* v. *Fox*, 300 U. S. 82, 93–97, may be placed either in this category or with the cases listed in note 23, *supra*.

[27] *Wilkes* v. *Dinsman*, 7 How. 89, 123, 130; *Truax* v. *Raich*, 239 U. S. 33, 37–38.

[28] *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541; *Parish* v. *MacVeagh*, 214 U. S. 124; *Houston* v. *Ormes*, 252 U. S. 469, 472–473; compare *Ness* v. *Fisher*, 223 U. S. 683, 691–694.

[29] See e. g., *Ex parte Young*, 209 U. S. 123, 151–152, 159–160; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108–111; *Truax* v. *Raich*, 239 U. S. 33, 37; *Pierce* v. *Society of Sisters*, 268 U. S. 510.

[30] Compare the contrasting situation in which the Government has a proprietary interest which will be protected whatever the validity of the regulation. *United States* v. *Kapp*, 302 U. S. 214, 217–218; *Kay* v. *United States*, 303 U. S. 1, 6–7.

It is unnecessary to attempt to reconcile the rationale of these cases with those earlier discussed, or to enter into the difficult task of calibrating the current vitality of each line of cases. For the respondents come within none of the situations in which a suit against the Government officer has sometimes been allowed. They neither have nor claim title to or possession of the public lands to which they seek free access; there is no invasion of their personal rights; and the object of the Taylor Grazing Act is not to regulate the respondents' conduct of their livestock business but to protect the lands of the Government. The respondents, in other words, have no legal right which under any rule is sufficient to warrant enjoining the officer to give protection against the Government's use of its property. *Tennessee Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118, 137. It follows that, even under the most lenient decision of this Court, the courts below have no power to resolve the respondents' controversy with the Government by issuing process against its officer.

B. THE SECRETARY OF THE INTERIOR IS AN INDISPENSABLE PARTY AND HAS NOT BEEN JOINED

The Supreme Court of Nevada ruled, without discussion, that the Secretary of the Interior was not an indispensable party defendant (R. 50). Respondents support this decision and urge (Br. in Opp. 9–12) in addition, that the question is one of state law. If the suit be held not to be brought

against the United States, we are not entirely clear that it is necessary in this case to join the Secretary of the Interior. But it seems evident that the question in any case is one of federal and not of state law.

1. *The Question is One of Federal Law.*— Whether or not the Secretary of the Interior is a necessary party to this action is a question (a) relating to the organization of the federal government, and (b) one which the Nevada court decided on the basis of federal, not state, law.

(a) As we have shown, the complaint asked and the judgment awarded relief against the Regional Grazier, the effect of which was to give respondents' livestock free access to the public range. The petitioner has been enjoined from enforcing regulations prescribed by the Director of Grazing with the approval of the Secretary of the Interior. Whether the subordinate official of the United States can be held to answer for regulations prescribed by his officials, and whether the operation of federal laws and regulations can be avoided by suit against the subordinate official who is in the locality, are questions which reach deeply into the organization of the federal government.

Specifically, the question as to the necessity of joining the Secretary of the Interior involves or may involve the following issues, which plainly are questions of substance not procedure, and which

plainly are matters of federal law. Whether the direction of the Secretary overrides a state court injunction; whether the petitioner has authority to disregard the Secretary's order if he views it as invalid; whether the petitioner's duties as a federal official involve an individual liability; whether the functions of the Department of the Interior may be halted by process against a local officer; and whether the Secretary would be justified in directing some official other than petitioner, against whom alone the injunction operates, to exclude respondents' livestock from the public range.[31]

This Court has held that the allowance of interest upon claims which are based on federal statutes is governed by federal law. *Board of Commissioners* v. *United States,* 308 U. S. 343, 349–350. The consequences of transactions condemned by federal statutes are questions of federal law. *Dietrick* v. *Greaney,* 309 U. S. 190, 200–201; *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.,* No. 78, this Term; see *Avotin* v. *Atlas Exchange National*

[31] It may well be that questions of local law are also involved. Whether adequate relief can be given in the absence of the Secretary, and the strictness with which the Nevada courts enforce the requirement that interested parties be before it, are doubtless matters of state practice. And, even if the Secretary were not an indispensable party under the federal rule, these state requirements would have to be satisfied. The error of the respondents (Br. in Opp. 11) is in supposing that these are the only issues involved.

Bank, 295 U. S. 209. Whether a private person may sue on a postmaster's bond is a question of federal law. *United States* v. *National Surety Corp.,* 309 U. S. 165, 169. These decisions are illustrative of the cardinal principle that transactions or controversies which find their roots in federal statutes or regulations are governed in their entirety by federal law. See Notes, 41 Col. L. R. 125; 54 Harv. L. R. 141. They apply *a fortiori* here, where the basic question relates to the organization of a great executive department of the United States, the liabilities and responsibilities of a federal official, and the means by which an activity of the United States may be halted through judicial action.

Respondents do not argue that it is a question of state law whether or not the United States is an indispensable party. We see no room for a different rule when the question is whether the Secretary of the Interior is an indispensable party.

(b) The Supreme Court of Nevada did not share respondents' belief that it was faced with a question of local law. It did not rely upon local statutes or decisions. It attempted instead to apply what it believed was the federal law. This is evidenced by its reliance (R. 50) on *Colorado* v. *Toll,* 268 U. S. 228, and 28 Am. Jur. 453, § 276, n. 12 (which in turn cites *Colorado* v. *Toll* and *Work* v. *Louisiana,* 269 U. S. 250). Hence, the decision below cannot be construed as a definitive adjudica-

tion of Nevada law, but is simply an effort to apply federal law.[32]

2. *The Secretary Is An Indispensable Party.*—It is clear, then, that whether or not the Secretary of Interior is an indispensable party to the maintenance of this suit is a question of federal law. We are not so clear that federal law, in the circumstances of this case, requires his joinder if the suit were held not to be one against the United States.

There seems on principle to be only one clear situation in which the suit might properly be brought against the superior officer but not against his subordinate alone. That is where the bill is not laid against the Government but yet seeks relief which cannot be secured through compulsion of the subordinate alone.

But where the plaintiff can obtain all he wants by control of the subordinate, every reason which points to the necessity of joining the superior officer points equally to the conclusion that the Court is in any event without jurisdiction because the suit is against the United States. It seems, for example, obviously inappropriate in this case to test the validity of the Secretary's regulations by impleading the Acting Regional Grazier for Region Three.

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[32] Even, then, if the question were one of state rather than federal law, this Court would not be bound by the ruling of the Nevada court if the decision were the result of a misreading of the federal rulings. *Tipton* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 298 U. S. 141, 152; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 120; see *Breisch* v. *Central Railroad of N. J.*, No. 384, this Term.

The effect of the suit upon the public lands of the United States, the interference with the functions of the Department of the Interior, and the absence of any interest of his own make the petitioner an anomalous defendant in this action. But if the Secretary for these reasons is a more appropriate defendant, by the same token the suit is one against the United States.[33]

The doctrine that a superior officer must be made a party to the suit against his subordinate originated and has generally been applied in circumstances where the subordinate had neither authority nor capacity to grant the relief prayed. The rule first appeared in *Vernon* v. *Blackerby,* 2 Atk. 144 (Ch. 1740), in which Lord Hardwicke dismissed as preposterous a bill against a minor official praying that he distribute funds which Parliament had placed in the control of his superiors. In this country the doctrine was first applied in *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, where the bill sought both the issuance of a land patent and an injunction against further trespasses of government officials. In both these cases affirmative relief was requested which could not have been given without the active concurrence of the superior officer.

[33] Analytically, one may suppose that a suit might be considered to be an interference with the functions of government almost but not quite sufficient to be held a suit against the United States. In such a situation, considerations of propriety would suggest the necessity of the Secretary as a party defendant. But as a practical matter, any such rule would serve only to increase the extremely confused state of the law.

During the next quarter of a century these cases were not construed as casting any doubt on the propriety of seeking negative relief, which could be obtained from the subordinate official alone, without the joinder of his superior.[24] But in 1924 this Court went one step further and laid down the general doctrine that the superior officer must be made a party defendant and given an opportunity to defend his direction and regulations. "He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied." *Gnerich* v. *Rutter*, 265 U. S. 388, 391. The *Gnerich* case was reaffirmed in *Webster* v. *Fall*, 266 U. S. 507, where this Court disposed of earlier decisions in which relief had been granted against a subordinate without the joinder of his superior by stating that it was not bound by decisions upon questions which merely lurked in the record and which were not called to its attention. The general language of the *Gnerich* case, coupled with the dismissal in the *Webster* case of decisions where the question had been passed over *sub silentio*, seemed to lay down a general rule requiring the joinder of the superior in all suits where administrative rules and regulations were challenged.

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[24] See, e. g., *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Swigart* v. *Baker*, 229 U. S. 187; *Missouri* v. *Holland*, 252 U. S. 416; *Leach* v. *Carlile*, 258 U. S. 138; *Hill* v. *Wallace*, 259 U. S. 44.

But five months later the whole doctrine was thrown into confusion by the opinion in *Colorado* v. *Toll*, 268 U. S. 228, holding that the state could obtain injunctive relief against a federal park official without joining the superior officer. The *Warner Valley*, *Gnerich*, and *Webster* cases, although cited in the Government's brief, went unmentioned in the short opinion written by Mr. Justice Holmes. Possibly these several decisions can be reconciled on the ground that in *Colorado* v. *Toll* the quasi-sovereign rights of the state were involved and hence it was deemed appropriate to relax the rule requiring joinder of the superior.[35] Support for this view can be found in the language of the opinion (p. 230) and in the fact that *Missouri* v. *Holland*, 252 U. S. 416, 431, was the only case cited on the point. See *National Conference on Legalizing Lotteries, Inc.* v. *Goldman*, 85 F. (2d) 66 (C. C. A. 2d); *Carr* v. *Desjardines*, 16 F. Supp. 346, 349 (W. D. Okla.)

However this may be, the current state of the law is in an extremely confused condition so far as

[35] The cases can more readily be classified if the doctrine be viewed simply as another facet of the immunity of the Government from suit. In neither the *Gnerich* nor the *Webster* case was the plaintiff resisting invasion of property in his possession, while the State in the *Toll* case had property and jurisdictional rights in the roads through the park (note 22, supra, *pp.* 20–21). This, of course, is not a "reconciliation" of the cases but simply an adoption of the unrationalized distinctions found in the field of suits against the Government.

concerns suits to enjoin subordinate officers from acting under direction of their superiors.[36] It is the belief of the Fifth Circuit, and apparently of the court below, that *Colorado* v. *Toll* overrules the doctrine laid down in the *Gnerich* case.[37] The Second, Third, and perhaps the Tenth Circuits have decided otherwise.[38] The Ninth Circuit, and perhaps the Fourth Circuit, appear to follow the *Gnerich* decision in cases where the superior's discretion is attacked,[39] and *Colorado* v. *Toll* where a

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[36] It is clear, both under the authorities and on principle, that the superior must be joined in those cases where affirmative relief is sought and where the performance of the duty in question involves action or an exercise of discretion which can be done only by the superior. See *Vernon* v. *Blackerby*, 2 Atk. 144 (Ch. 1740); *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28; *Webster* v. *Fall*, 266 U. S. 507. The difficulty relates to the cases, such as this, where the plaintiff can obtain the relief he asks by compulsion of the subordinate alone.

[37] *Rood* v. *Goodman*, 83 F. (2d) 28 (C. C. A. 5th); *Ryan* v. *Amazon Petroleum Corporation*, 71 F. (2d) 1 (C. C. A. 5th), reversed on other grounds, 293 U. S. 388; *Yarnell* v. *Hillsborough Packing Co.*, 70 F. (2d) 435 (C. C. A. 5th); cf. *Janes* v. *Lake Wales Citrus Growers Ass'n*, 110 F. (2d) 653 (C. C. A. 5th).

[38] *National Conference on Legalizing Lotteries, Inc.* v. *Goldman*, 85 F. (2d) 66 (C. C. A. 2d); *Alcohol Warehouse Corporation* v. *Canfield*, 11 F. (2d) 214 (C. C. A. 2d); *Chamberlain* v. *Lembeck*, 18 F. (2d) 408 (C. C. A. 3d); *Jump* v. *Ellis*, 100 F. (2d) 130, 135 (C. C. A. 10th), certiorari denied, 306 U. S. 645.

[39] *Moore* v. *Anderson*, 68 F. (2d) 191 (C. C. A. 9th); *Moody* v. *Johnston*, 66 F. (2d) 999 (C. C. A. 9th); *Appalachian Elec. Power Co.* v. *Smith*, 67 F. (2d) 451 (C. C. A. 4th).

lack of statutory authority is alleged.[40] The district courts show a corresponding variety of decision.[41] The Federal Rules of Civil Procedure contemplate that government officers may be sued, but throw no light on the question whether a subordinate official may be sued without joinder of his superior.[42]

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[40] *Berdie* v. *Kurtz*, 75 F. (2d) 898 (C. C. A. 9th); *Darger* v. *Hill*, 76 F. (2d) 198 (C. C. A. 9th); cf. *Ferris* v. *Wilbur*, 27 F. (2d) 262 (C. C. A. 4th).

[41] Compare, holding the superior to be an indispensable party, *Dami* v. *Canfield*, 5 F. (2d) 533 (S. D. N. Y.); *A. H. Belo Corp.* v. *Street*, 35 F. Supp. 430 (N. D. Tex.); *Redlands Foothill Groves* v. *Jacobs*, 30 F. Supp. 995 (S. D. Cal.); *Carr* v. *Desjardines*, 16 F. Supp. 346 (W. D. Okla.); *Consolidated Gas Co. of New York* v. *Hardy*, 14 F. Supp. 223 (S. D. N. Y.); *Wheeler* v. *Farley*, 7 F. Supp. 433 (S. D. Cal.), with the contrary decisions in *Connecticut Importing Co.* v. *Perkins*, 35 F. Supp. 414 (D. Conn.); *Bailey Gaunce Oil & Refining Co.* v. *Duncan*, 10 F. Supp. 280 (W. D. La.).

[42] Rule 4 (d) (*) provides for service "Upon the United States * * * and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency." Its requirements are adopted with respect to suits against an officer (though cf. *Moore*, Federal Practice, sec. 4.24, n. 5). Rule 4 (d) (5) provides for service "Upon an officer or agency of the United States, *by serving the United States* and by delivering a copy of the summons and of the complaint to such officer or agency." One might find in these provisions for service a tenuous implication that the subordinate officer might be made to answer for his superior's regulations. But nothing suggests that the Rules intended to enlarge the power otherwise existing to enjoin federal officers. Cf. *United States* v. *Sherwood*, No. 500, this Term. In general, the rules include both the United States and its officers or agencies in the same category. See Rules 12 (a),

The considerations of policy, as to whether the superior officer must be joined when the suit is not one directed at the United States and when the full relief may be obtained by compulsion of the subordinate, seem to point in no certain direction. On the one hand, unless the superior be joined, the subordinate will be under a duty to obey the mandate of the court and at the same time subject to commands which his superior has issued and which the latter is under no legal compulsion to revoke. Note (1937) 50 Harv. L. Rev. 796, 801; (1937) 37 Col. L. Rev. 140, 141; (1940) 26 Va. L. Rev. 370, 371. Joinder also avoids the necessity of a multiplicity of actions throughout the country.[43] A requirement that the superior must be joined will generally assure the Government of a trial in a federal court. Furthermore, if the superior is joined, this will mean that most suits of this nature will have to be brought in the District of Columbia, where they can be more conveniently defended by the Government.[44] On the other hand, the cost of liti-

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13 (d), 24 (c), 54 (d), 55 (e), 62 (e), and 65 (c); cf. Rules 37 (f) and 39 (c). Rule 25 (d) provides for the substitution of successor government officials.

[43] This is a consideration of particular importance in the event there should be litigation so voluminous as seriously to impede, by design or by accident, the Government's litigation functions. Cf. *Landis* v. *North American Co.*, 299 U. S. 248.

[44] Compare the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505, 28 U. S. C. Sec. 41 (20), where Congress has laid down the requirement that all large claims against the United States be filed at the seat of the Government, so as to avoid "attendant dislocation of government business by

gating the validity of an administrative order in the District of Columbia, especially when small sums are involved, may serve virtually to deprive the individual in a distant state of any remedy whatever.[45] Note (1937) 50 Harv. L. Rev. 796, 801; (1937) 37 Col. L. Rev. 140, 142; (1941) 50 Yale L. J. 909, 916–917. It frequently will be easier for the Government to defend the suit in the various judicial districts of the United States through its district attorneys than it is for the private litigant to come to Washington. *Ibid.*

We have, then, an issue in which both the authorities and the considerations of policy point in both directions. It seems important that the operations of the Government not be brought to a halt by suits against its officers (Point A, *supra*); it seems important that, if injunction be available, it be sought in federal rather than state courts (Point C, *infra*). But it does not seem to us to be a matter of particular consequence, if the suit can in fact be brought against the officer rather than the Government, whether the nominal defendant be the

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the appearance of important officers at distant points". *United States* v. *Shaw*, 309 U. S. 495, 502.

[45] See Sec. 50 of the Judicial Code, c. 231, 36 Stat. 1101, 28 U. S. C. Sec. 111, which authorizes the district courts to entertain and adjudicate the rights of the parties who are properly before it, provided the decree does not conclude or prejudice the rights of nonresidents who cannot be served. Cf. Rule 19 (b) of the Federal Rules of Civil Procedure, which contemplate that some absent parties may be indispensable.

superior or the subordinate officer. Nor, in the case where the plaintiff can obtain all he seeks by compulsion of the subordinate alone, does there seem to be any compelling reason of logic or of law why the superior must necessarily be joined. In either case, the real objection is that the Government itself is impleaded.

In the abstract, then, we view it as a matter of comparative indifference whether or not the respondents may proceed against the petitioner without joining the Secretary of the Interior. The true force of this consideration we believe to consist in the emphasis that it gives to the more fundamental propositions that the Government may not be sued through its officer, and that the state courts are without power to enjoin a federal official. But, since this case comes fractionally closer to the *Gnerich* than to the *Toll* case, we submit that the Secretary was an indispensable party, and that the suit must be dismissed.

C. THE STATE COURTS HAD NO JURISDICTION TO ENJOIN A FEDERAL OFFICER

Even if it be held that this is not a suit against the United States, and that the Secretary of the Interior is not a necessary party, there remains a basic objection to the maintenance of this action. The nature of the federal system is such that the courts of a state are without power to enjoin the action of a federal officer.[46] The precise question

[46] This question was not raised in the petition, but since it presents a question of jurisdiction we do not understand that we are foreclosed from arguing it.

seems, curiously enough, never to have been considered by this Court. But we think analogic principles, firmly settled both in the decisions of this Court and in the fundamental relationship between the states and the nation, point to the proper result with considerable clarity.

It has long been settled law that the process of a state court could not issue to interfere with the prosecution of suits in the federal courts or with the execution of judgments of federal courts.[47]

After preliminary uncertainty,[48] this Court settled that both the judicial and the executive branches of the Government were to be protected against interference from state courts, when the interference takes the form of a writ of habeas corpus. *Ableman* v. *Booth,* 21 How. 506; *Tarble's Case,* 13 Wall. 397; see *Robb* v. *Connolly,* 111 U. S. 624, 639; *Ex parte Royall,* 117 U. S. 241, 249. In *Tarble's Case,* the Court explained the reason for the rule (13 Wall. at 409):

> It is manifest that the powers of the National government could not be exercised with energy and efficiency at all times if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.

This policy applies equally, if not *a fortiori,* to the direct interference with federal functions which

[47] *McKim* v. *Voorhies,* 7 Cranch 279; *Freeman* v. *Howe,* 24 How. 450; *Riggs* v. *Johnson County,* 6 Wall. 166; *United States* v. *Council of Keokuk,* 6 Wall. 514.

[48] Warren, *Federal and State Court Interference,* 43 Harv. L. Rev. 345, 353–357.

arises when the state court issues an injunction against the federal officer. If it is necessary for the Federal Government to have an unrestrained custody of its prisoners, it would seem an equal necessity that its functions be performed without interference by a state court decree.

Issuance of an injunction by a state court against a federal officer would seem also to be a consequence of the settled principle that a state court is without power to issue writs of mandamus to federal officials. *McClung* v. *Silliman,* 6 Wheat. 598; *Ex parte Shockley,* 17 F. (2d) 133 (N. D. Ohio); cf. *Boske* v. *Comingore,* 177 U. S. 459. The writs of mandamus and injunction differ only in form so far as this issue is concerned; each is an undertaking by a state court to control the performance of federal duties.

The Court in *Keely* v. *Sanders,* 99 U. S. 441, made it plain that the principle of the habeas corpus and the mandamus cases would apply equally to injunctions. There the Court declared (99 U. S. at 443):

> No state court could, by injunction or otherwise, prevent Federal officers from collecting Federal taxes. The government of the United States, within its sphere, is independent of State action.

While it is possible to distinguish the *Keely* case upon the traditional reluctance to restrain the collection of federal taxes, its statement is cast in terms of a principle of general application.

The state courts, so far as they have considered this question, seem generally to have ruled that they were without power to control a federal official, whether by writ of mandamus or by injunction. *Brewer* v. *Kidd,* 23 Mich. 440; *Hinkle* v. *Town of Franklin,* 118 W. Va. 585, 191 S. E. 291; *Goldstein* v. *Sommervell,* 170 Misc. 602, 10 N. Y. Supp. (2d) 747; see *Mallory* v. *Wheeler,* 151 Wis. 136, 138 N. W. 97; see also, *In re Turner,* 119 Fed. 231 (C. C., D. C., S. D., Ia).

On authority of the habeas corpus cases, Charles Warren has categorically stated [49] that "It has been conclusively determined that the state courts possess no power to enjoin a federal official * * *." Another commentator [50] has similarly read these cases:

> No state can lawfully do an act which will suspend even for a moment the machinery of the national government * * *. This is fundamental in our duplex system of government, in which the constitution and laws of the United States and treaties made under its authority are the supreme law of the land."

Dicta in the decisions of this Court point to the same result. *Tennessee* v. *Davis,* 100 U. S. 257, 262–263; *In re Neagle,* 135 U. S. 1, 61–62.

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[49] Warren, *Federal and State Court Interference,* 43 Harv. L. Rev. 345, 358.

[50] Bishop, *Judicial Control of Federal Officers,* 9 Col. L. R. 397, 407. See also, *Power of a State Court to Enjoin N. L. R. B. Officials,* 36 Mich. L. Rev. 1344, 1347–1351.

Respondents might argue that this analysis is merely a rephrasing of our position that this suit is in truth directed against the United States. It could be argued that, if the federal official is acting without proper authority, whether in the statute or in the Constitution, he acts only as an individual and not as an official; the conclusion of this argument would be that the federal officer may be brought before a state court upon a prayer for an injunction against him as an individual if only the complaint alleges that he is acting without proper authority. The same contention, however, has been made and has been rejected in the habeas corpus cases. *Tarble's Case,* 13 Wall. 397, 410–411. If allegations of excess authority give to the state courts no power to determine whether or not a writ of habeas corpus should issue, similar allegations should correlatively confer upon the state courts no power to determine whether to issue a writ of injunction.

We have found no case in which a state court has been held, after consideration of this argument, authorized to enjoin a federal official.[51] There are,

[51] In *Stanley* v. *Schwalby*, 162 U. S. 255, the Court ordered an action of trespass to try title, brought in the state courts against army officers, to be dismissed on the merits. And in *Scranton* v. *Wheeler*, 179 U. S. 141, the Court considered on the merits an action of ejectment brought in a state court against the federal officer in charge. In neither case did the Court consider the power of the state courts to entertain these actions, which would be followed by compulsory process akin to the decree of injunction, and in neither case did it affirm the decision on the merits. Again, in *Northern*

it is true, a number of inferences which may be drawn to oppose our argument. (1) The "Force Act," Section 33 of the Judicial Code (28 U. S. C., Sec. 76), confers the right of removal to federal court upon any officer acting under the revenue laws, or any officer of a federal court or of Congress, against whom any suit is brought in a state court for action taken under the authority or color of his office. An implication might be drawn from this legislation that all other federal officers are to be left to defend actions against them in the state courts unless there were some other ground of removal.[52] Cf. *Gay* v. *Ruff*, 292 U. S. 25, 37–38; *Maryland* v. *Soper* (No. 2), 270 U. S. 36, 44. But the statute is primarily concerned with the historic

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Pac. Ry. Co. v. *North Dakota*, 250 U. S. 135, and in *Dakota Cent. Tel. Co.*, v. *South Dakota*, 250 U. S. 163, the Court reversed on the merits mandamus and injunction actions against federally controlled carriers which had been brought in the state courts. These cases, as we have explained (*supra*, n. 21, p. 20) are properly to be explained on the ground of the statutory waiver of immunity.

An early decision, decided long before the habeas corpus cases, held that an action of replevin against property held by a federal officer would lie in a state court. *Slocum* v. *Mayberry*, 2 Wheat. 1. It seems equally applicable to a bill for an injunction, but cannot be considered controlling at this date.

[52] The legislative history of Section 33 and its amendments contain no indication of the Congressional belief as to state court injunction jurisdiction. The 1916 amendment, extending the removal provisions to officers of federal courts (c. 399, 39 Stat. 532), occasioned one report (H. Rept. No. 776, 64th Cong., 1st Sess.) which assumed a jurisdiction in state courts to proceed against federal officers, to be followed by a federal writ of habeas corpus, but was silent as to the power to enjoin.

occasion for the Force Act, criminal prosecutions for the violation of state laws, and with the analogous suit for damages.[53] In neither case is there the direct interference with federal duties which is found in the habeas corpus, the mandamus, and the injunction suits. (2) A corresponding implication might be drawn from the analogous provision for the removal of suits against military officers of the United States. Article 117 of the Articles of War, 10 U. S. C., Sec. 1589. Yet none would suppose that, prior to its enactment in 1920 (41 Stat. 811), a state court could "control the army by writ of injunction." *In re Turner,* 119 Fed. 221, 235 (C. C., S. D., C. D. Ia.) (3) Again, Section 208 of the Judicial Code (28 U. S. C., Sec. 46) gives the district courts exclusive jurisdiction of suits to enjoin the enforcement of orders of the Interstate Commerce Commission. See *Lambert Co.* v. *Baltimore & Ohio R. R. Co.,* 258 U. S. 377; *Venner* v. *Michigan Central R. R. Co.,* 271 U. S. 127. But it is by no means clear whether this precautionary measure reflects a general policy to oust state courts of power to enjoin federal action or an exceptional provision in favor of the Commission.

[53] The state courts doubtless have jurisdiction to entertain suits for damages against federal officers. *Harris* v. *Dennie,* 3 Pet. 292; *Teal* v. *Felton,* 12 How. 284; *Buck* v. *Colbath,* 3 Wall. 334; *Leroux* v. *Hudson,* 109 U. S. 468. But it is more doubtful that state courts have authority to entertain prosecutions against federal officers. *Ohio* v. *Thomas,* 173 U. S. 276; see *In re Loney,* 134 U. S. 372; cf. *Johnson* v. *Maryland,* 254 U. S. 51; Compare *In re Mendenhall,* 10 F. Supp. 122 (D. Mont.).

We recognize that our argument carries a harsh consequence, in that plaintiffs seeking to enjoin a federal officer to protect rights of less than $3,000 are denied, except in the courts of the District of Columbia, a relief open to others. But the remedy, we think, lies with Congress rather than with a subjection of federal functions to the compulsory process of state courts.

II

CONGRESS HAS AUTHORIZED AND HAS RATIFIED THE CHALLENGED GRAZING RULES

The Supreme Court of Nevada, as we have shown, had neither jurisdiction nor power in this suit to pass on the validity of the system of temporary licenses and uniform fees prescribed in the Grazing Rules approved by the Secretary of the Interior on March 2, 1936 (reprinted *infra,* pp. 65–69). But, assuming that it had power to decide, its decision that the licenses and fees are unauthorized by the Taylor Grazing Act was erroneous.

A. THE LICENSES AND FEES ARE AUTHORIZED BY THE ACT

1. *They Are Authorized by Section 2.*—Section 2 of the Taylor Grazing Act (*infra,* p. 60) confers broad authority upon the Secretary. He shall—

> make provision for the protection, administration, regulation, and improvement of such grazing districts * * *, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary

> to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; * * *

This language is patterned after that of the Forest Reserve Act of 1897 (Sec. 1, 30 Stat. 35, 16 U. S. C., Sec. 551), a provision which this Court has twice construed as sufficiently broad to warrant the issuance of licenses and the collection of uniform fees for grazing livestock on national forests.[54] *United States* v. *Grimaud,* 220 U. S. 506; *Light* v. *United States,* 220 U. S. 523. There can, therefore, be no doubt that Section 2 of the Taylor Grazing Act, if it stood alone, would be ample authority for the issuance of temporary licenses and the collection of uniform fees of the character prescribed by the Rules of March 2, 1936.

2. *The Authority is Not Destroyed by Section 3.*— Respondents seek to escape the settled scope of the broad authority conferred by Section 2 of the Taylor Grazing Act by arguing that Section 2 is

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[54] The Forest Reserve Act, as amended at the time of the *Grimaud* case (220 U. S. at 509) provided that the Secretary of Agriculture was authorized to—

> make provision for the protection against destruction by fire and depredations upon the public forests and forest reservations * * *; and he may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; * * *

impliedly restricted by the specific provisions of Section 3, which deal with the issuance of term permits. The court below so ruled (R. 55–57). A contrary opinion is indicated in *Gavica* v. *Donaugh*, 93 F. (2d) 173 (C. C. A. 9th).

Section 3 of the Act, *infra*, pp. 61–62, authorizes the Secretary, upon the payment of reasonable fees, to issue permits for grazing upon the public range. The class of permittees is defined and the grant of preferential rights are prescribed. The permits shall be for a period of not more than ten years, and renewal preferences are provided.

It cannot be denied that the Secretary of the Interior, in undertaking the administration of the Taylor Grazing Act in 1934, was faced with some very large and very practical problems. More than 15,000 persons had been using the public range under an implied license, grazing thereon more than 8,000,000 head of livestock annually.[55] Although the Taylor Grazing Act terminated this implied license,[56] it nevertheless recognized that previous

[55] Cf. Annual Report, Sec'y Int., 1937, pp. 105–106.

[56] In the silence of Congress, there is an implied grazing license. *Buford* v. *Houtz*, 133 U. S. 320. But the Taylor Grazing Act is plainly intended to terminate this license. Section 3 provides for term grazing permits, and none would question that unlicensed use of the land is forbidden after they are available. And the temporary licenses issued under Section 2 are substantially the same, both in terms and in the statutory authority, as those issued under the Forest Reserve Act. In *Light* v. *United States*, 220 U. S. 523, 535, this Court expressly ruled that the implied license conferred no vested right upon those who used the range and was terminated by the regulation of the Secretary.

users should be accorded certain priority rights, to be based upon citizenship, residence in or near a grazing district, the ownership or occupancy of other grazing facilities, and the possession of water rights. Section 3, *infra*, p. 61. The determination and allocation of grazing privileges among some 15,000 prior users in accordance with these provisions was no small administrative undertaking.

The Secretary realized that a hasty and improper issuance of term permits could have disastrous consequences. If too many were issued, the evils which the Act was designed to remedy, such as overgrazing, soil erosion, and range destruction would be continued and even aggravated, because the renewal requirements of Section 3 are so rigid as in many cases to prevent any subsequent equitable cancellation of such permits.[57] On the other hand, if too few were issued, the livestock industry would be completely disrupted during the transition period.

The Secretary, in addition, had the tremendous task of creating, after a hearing held in each State,

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And in *Omaechevarria* v. *Idaho*, 246 U. S. 343, 352, the Court held in terms that "Congress has not conferred upon citizens the right to graze stock upon the public lands. The Government has merely suffered the lands to be so used." See, also, *United States* v. *Grimaud*, 220 U. S. 506, 521; *Itcaina* v. *Marble*, 56 Nev. 420, 432–433, 55 P. (2d) 625 (1936).

[57] Section 3 (*infra*, pp. 61–62) gives the existing permittees a "preference right" and provides that no permittee shall be denied a renewal when the denial would impair the value of his grazing unit pledged as security for a *bona fide* loan.

grazing districts for some 142,000,000 acres, or 221,875 square miles.[58] Section 1, *infra*, p. 59. The grazing permits for this vast area were to be issued "upon the payment annually of reasonable fees in each case to be fixed or determined from time to time." Section 3, *infra*, p. 61. This required that some sort of estimate be made of the value of the various lands for grazing.

To complicate matters still further, the capacity of the range in many places had been impaired by prolonged drought, by rodents, and by overgrazing. If these lands were to be restored, the inauguration of certain protective and rehabilitation measures was immediately necessary. Whether these lands could be restored depended upon the effectiveness of these measures and to some extent upon the whims of nature. Section 3 could not be complied with until these speculative factors were reduced to a minimum.

Quite evidently, the accumulation of the necessary data could not be completed for a long period of time.[59] This was known to Congress when it

[58] This area is substantially larger than that of New England and the Middle Atlantic States (including West Virginia and Maryland) combined.

[59] In fact, after six years, the task is only now nearing completion. Term permits have been issued in one district and authorized in another. During the next few months, permits are to be issued to approximately 50% of the present holders of temporary licenses, with additional permits in succeeding years as the necessary data is finally correlated. The Department of the Interior states that Nevada Grazing District No. 1, where this suit arises, cannot be placed on a permit basis for at least another year.

passed the Act. For example, Associate Forester Sherman had told the Public Lands Committee in 1933 that "There is not in the country an organization that would be prepared or equipped to put all of these [public] lands under administration tomorrow. It will have to be done gradually."[60] Mr. Taylor, the sponsor of the Act, was of a similar opinion: "Of course, it will take some time to readjust the grazing rights [under the new Act]."[61]

Accordingly, it was only natural that the Secretary's power to issue permits should be cast in permissive rather than mandatory terms. Under Section 1, *infra*, p. 59, he was "authorized, in his discretion, by order to establish grazing districts." Under Section 3, *infra*, p. 61, he was "authorized to issue or cause to be issued permits to graze livestock on such grazing districts." The Secretary's authority is plainly to be exercised as an when it becomes feasible.

In contrast, Section 2, *infra*, p. 60, is phrased in mandatory language. The Secretary "*shall* make provision for the protection, administration, regulation and improvements" of the grazing districts; he "*shall* make such regulations * * * and do any and all things to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occu-

[60] Hearings, H. Committee on Public Lands, H. R. 2835, 73d Cong., 1st Sess., and H. R. 6462, 73d Cong., 2d Sess. (1934), p. 51.

[61] *Ibid*, p. 77. Cf. similar observations made to the committee by Secretary Ickes, *ibid.*, p. 136.

pancy and use * * *." It could not have been the purpose of Congress to make the protection and regulation of the range await the completion of the major administrative task faced by the Secretary, and the contrast in the mandatory and permissive language aptly points the Congressional decision. Cf. *Moore* v. *Illinois Central R. Co.*, No. 550, this Term.

Under Section 2, modeled upon the Forest Reserve Act, the Secretary was fully empowered to prescribe temporary licenses and uniform fees (*supra*, pp. 42–43). Congress could not have intended to destroy this power, given in the form of a mandatory direction, by permissive authority to institute a more refined system of licensing. An enumeration of things which *may* be done does not restrict other grants of authority more broadly worded. *Springer* v. *Philippine Islands*, 277 U. S. 189, 206. Congress knew that a permanent licensing system would take years to develop, and could hardly have intended by granting the additional authority in Section 3 to destroy the powers, granted the Secretary by Section 2, to take immediate steps to preserve the public range. Any such construction would frustrate the explicitly declared purposes of the Act and would read into its provisions an unreasonable and self-defeating interpretation.[62] The separate sections of an Act

[62] The committee reports on the Taylor Grazing Act underscore the magnitude and the urgency of its objec-

are normally to be taken as supplementary rather than mutually destructive.

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tives. Each report states (H. Rept. No. 903, 73d Cong., 2d Sess., pp. 1–2; S. Rept. 1182, 73d Cong., 2d Sess., pp. 1–2):

"At the present time there are approximately 173,000,000 acres of unreserved and unappropriated public land in the ownership of the Federal Government, situated almost wholly in 11 Western States. These public lands form a vast domain, composing more than one-tenth of the entire area of the United States. Their surface is now and always has been a great grazing common free to all users. The grazing resources of these lands are now being used without supervision or regulation, and there is constant competition among the various users who desire to obtain exclusive benefit of the forage growth. The result of this competitive practice has been lack of proper care and progressive deterioration in the value of the native forage crop, with the attendant evils of soil erosion and removal of protection in drainage areas. It has been estimated that for the open public domain as a whole the yield of forage has been reduced from one-half to two-thirds during the last 25 years. Without regulation further destruction is inevitable.

Where overgrazing is permitted to disturb the balance of nature, erosion must result, which in turn increases flood hazards and promotes the siltation of irrigation reservoirs and ditches and jeopardizes the water supply for irrigation, urban consumption, and other uses. So ruinous a use of the public domain should not be permitted and, if it is continued, will result in the reduction of these vast areas to eroded and barren wastes.

The situation above set forth is a source of grave national concern, both to Government officials interested in the conservation of the natural resources of the public domain and stockmen whose operations are dependent upon grazing. The stockman desires assured grazing privileges, on the basis of which definite plans for public operations can be adopted, and the Government desires the conservation and wise development of an extremely valuable, natural resource. Since the lands are the property of the Federal Government, it is its responsibility, as well as its right, to

The primary purpose of all rules of statutory construction, of course, is to ascertain and give effect to the intent of the legislature. *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 542; *Foster* v. *United States,* 303 U. S. 118, 120; *Gulf States Steel Co.* v. *United States,* 287 U. S. 32, 45. No rule of construction can be followed so blindly as to produce an absurd result and defeat the declared purposes of the law. *Danciger* v. *Cooley,* 248 U. S. 319, 326. It is submitted that respondents' rule of construction, were it to be applied during the infancy of this statute, would defeat the very purposes of the Act and would render it unworkable.

Quite obviously the provision in Section 3 that permits are to be issued "upon the payment annually of reasonable fees in each case to be fixed or determined from time to time," does not preclude the issuance of temporary licenses, or even permits, at a low uniform fee. The temporary rates (5¢ a month for each head of cattle and 1¢ for sheep) are regarded by the Department of the Interior as far below the actual value of the public range, and hence certain not to be unreasonable in any particular case. The "reasonable fee' provision of Section 3 was inserted for the benefit of the stockmen—to prevent *excessive* exactions. If

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protect and improve them, so that they may be put to the highest productive use, to stabilize the livestock industry, to protect watersheds, and check erosion."

the Government elects to charge a lower fee, the stockmen cannot complain.[63]

An administrative construction which is within the language of a statute should not be lightly disturbed by the courts. *Brewster* v. *Gage*, 280 U. S. 327, 336. The construction placed on Sections 2 and 3 of the statute by the agency charged with its administration advances the purposes, and does no violence to the language, of the Taylor Grazing Act. And it is to be remembered that administrative practice "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378.

B. THE LICENSES AND FEES HAVE BEEN RATIFIED BY CONGRESS

The system of temporary licenses and uniform fees prescribed by the Grazing Rules of March 2, 1936, is, then, fully authorized by the Taylor Grazing Act. But, even if there were originally room for doubt, there can be none at this day. For Congress has by subsequent legislation ratified the sys-

[63] The allegation in the complaint that the uniform fees are not reasonable (R. 9) presents at least a conclusion of fact, if not one of law, and is not admitted by the demurrer. *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249, 254, and cases cited; *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498, 500.

tem of temporary licenses and uniform fees of which respondents complain. In fact, these regulations have been approved in three different ways:

1. *Congress Has Made Appropriations Based on the Fees.*—Congress at an early date and on a number of occasions was apprised of the fact that the Department was issuing temporary licenses instead of term permits.[64] In testifying before a Subcommittee of the House Committee on Appropriations in December 1935—almost three months before the promulgations of the rules and regulations of March 2, 1936—Mr. Carpenter (the then Director of the Division of Grazing) pointed out that *temporary licenses, as distinguished from permits,* were to be issued on a uniform fee basis during the coming year and that the total revenue therefrom would be approximately $1,000,000—of which 25% (or $250,000.00) could be appropriated for range improvements under Section 10 of the

[64] In addition to the appropriation committee hearings referred to, *infra*, pp. 53–54, see also the Annual Reports of the Secretary of the Interior: 1936, pp. 16–17; 1937, pp. xii, 102, 105–107; 1938, pp. xv, 107. In a letter read into the Congressional Record on March 25, 1937, Mr. Carpenter made the following statement: "At the very beginning of this matter [the administration of the Taylor Grazing Act], I realized that it would take several years to get enough accurate information and knowledge of the subject to issue term permits with fairness, and for that reason the division has functioned on a temporary yearly basis and has issued licenses only. This has enabled us to correct our rules as we go along. * * *." 81 Cong. Rec., pt. III, pp. 2738–2739 (1937). Cf. 81 Cong. Rec., pt. IV, pp. 4570–4571 (1937); 83 Cong. Rec., pt. III, pp. 2548–2549 (1938).

act. Mr. Taylor, the author of the grazing act in question and also chairman of the House Appropriation Subcommittee, asked Mr. Carpenter to explain to the Committee the difference between licenses and permits. Mr. Carpenter pointed out in some detail the vast administrative problems which confronted the division, and explained the reasons for a temporary license system.[65] Mr. Taylor and other members of his committee saw nothing unusual or illegal in this program. In fact, the committee not only recommended the appropriation of $400,000.00 for general administrative expenses but also $250,000.00 for range improvements, with the proviso that the sum expended for improvements in any one grazing district should not exceed 25% of the moneys collected in that district.[66] This recommendation passed the House[67] and Senate[68] and became law.[69] Inasmuch as Congress knew that no permits were to be issued during the ensuing year and that any fees obtained would come from temporary licenses, the appropriation of money for range improvements on the basis of fees collected in the several grazing districts (25% of the estimated $1,000,000 revenue to be derived from temporary licenses) constitutes a ratification of the temporary license and fee system

[65] Hearings, Subcommittee of H. Committee on Appropriations, H. R. 10630, 74th Cong., 2d Sess. (1936), pp. 13–15.
[66] H. Rept. No. 1927, 74th Cong., 2d Sess. (1936), p. 3.
[67] 80 Cong. Rec., pt. II, pp. 1256, 1274 (1936).
[68] 80 Cong. Rec., pt. III, p. 3026 (1936).
[69] Act of June 22, 1936, c. 691, 49 Stat. 1757, 1758.

inaugurated by the Department pursuant to Section 2 of the Act. Any other construction of the appropriation statute renders it meaningless.

The subsequent appropriation hearings for the Division of Grazing have disclosed that uniform fees were being charged and collected for the issuance of temporary licenses.[70] And each successive appropriation act has authorized the expenditure of $250,000.00 for range improvements, the amount to be spent in any one district not to exceed 25% of the moneys collected therein.[71] Since the only moneys collected under the authority of the Act prior to 1939[72] were those received from the issuance of temporary licenses, these appropriations acts constitute a complete congressional ratification of the administrative practice of issuing tem-

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[70] Fiscal year 1938—Hearing, Subcommittee of H. Committee on Appropriations, H. R. 6958, 75th Cong., 1st Sess. (1937), pp. 80, 83, 89.

Fiscal year 1939—Hearings, Subcommittee of H. Committee on Appropriations, H. R. 9621, 75th Cong., 3d Sess. (1938), pp. 65, 70, 71; Hearing, Subcommittee of S. Committee on Appropriations, H. R. 9621, 75th Cong., 3d Sess. (1938), pp. 3, 28, 29.

[71] Act of August 9, 1937, c. 570, 50 Stat. 564, 565; Act of May 9, 1938, c. 187, 52 Stat. 291, 292; Act of May 10, 1939, c. 119, 53 Stat. 685, 687; Act of June 18, 1940, c. 395, Pub., No. 640, 76th Cong., 3d Sess.

[72] No permits were issued in 1936, 1937, or 1938, and in only one district in 1939. Annual Report, Sec'y Int., 1936, pp. 14, 15, 16; ibid., 1937, pp. 105, 106, 108; ibid., 1938, pp. 107, 109, 113. See also 83 Cong. Rec., pt. XI, p. 2376 (1938); Cong. Rec., 76th Cong., 1st Sess., No. 131, pp. 11642, 11645 (1939).

porary licenses on a fee basis under the Rules and Regulations of March 2, 1936.[73] *Hamilton* v. *Dillin,* 21 Wall. 73, 96–97; *Street* v. *United States,* 133 U. S. 299, 307; *Wells* v. *Nickles,* 104 U. S. 444; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 147; *Swayne & Hoyt Ltd.* v. *United States,* 300 U. S. 297, 301, 302; *Duke Power Co.* v. *Greenwood County,* 91 F. 2d 665, 673, 674 (C. C. A. 4), aff'd, 302 U. S. 485.

2. *Congress virtually reenacted the Taylor Grazing Act in 1936.*—Knowing that the Division of Grazing was operating under a temporary license and uniform-fee system, Congress in June 1936 extended the provisions of the Taylor Grazing Act to another 62,000,000 acres of the public domain by removing the original 80,000,000-acre limitation and authorizing the establishment of grazing districts with a combined area of 142,000,000 acres.[74] This amounted to a virtual reenactment of the statute as to lands not embraced in the original Act of 1934, and is evidence of Congressional approval of the then existing administrative construction of the Act. *United States* v. *Alexander,* 12 Wall. 177,

[73] Fifty percent of the fees collected from temporary licenses have been paid to the States pursuant to the provisions of Section 10 of the act. Nevada, we are informed by the Division of Grazing, had received $191,414.40 by June 30, 1940. Her share has been affected by the injunction issued in the present case.

[74] Act of June 26, 1936, c. 842, 49 Stat. 1976.

180; *National Lead Co.* v. *United States,* 252 U. S. 140, 146.[75]

The amendatory Act of June 26, 1936, c. 84. 49 Stat. 1976–1979, not only widened the scope of Section 1, but it also amended Sections 7, 8, 10, and 15 of the original Act. A large part of the Act was rewritten. But Sections 2 and 3 were left unchanged. The failure of Congress to amend those sections in the face of the construction placed on them by the Department "is at least persuasive of a legislative recognition and approval of the statute as construed." *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 493; *Massachusetts Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269, 273. See *Swigart* v. *Baker,* 229 U. S. 187.[76]

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[75] In the *Alexander* case Congress in 1853 and 1855 extended a pension law to cover persons not included in the 1848 act; the 1855 amendment was held to constitute an approval of rules promulgated under the 1853 act as to when pensions should commence. In the *National Lead* case Congress extended the usual tariff drawback provision to oil cake made from imported seed; this was held to constitute an implied approval of the administrative interpretation of the drawback provisions which were then in force as to other articles.

[76] In the *Swigart* case it was declared to be significant that Congress had never taken any adverse action on the Secretary of the Interior's reports showing that assessments were being collected for the maintenance as well as for the construction of reclamation projects. See also *Alaska Steamship Co.* v. *United States,* 290 U. S. 256, 262; *Costanzo* v. *Tillinghast,* 287 U. S. 341, 345; *National Lead Co.* v. *United States,* 252 U. S. 140, 146; *Borax* v. *Ickes,* 98 F. 2d 271, 281 (App. D. C.), certiorari denied, 305 U. S. 619; *Corning Glass Works* v. *Robertson,* 65 F. 2d 476 (App. D. C.), certiorari denied, 290 U. S. 645.

3. The Civil Relief Act expressly recognizes the validity of the licenses and fees.—The Soldiers' and Sailors' Civil Relief Act of October 17, 1940, which became law one week before the opinion below was rendered, and which was not called to the Nevada court's attention, should remove any doubt that Congress has sanctioned the temporary license system of which respondents complain. Section 501 of that Act (Public, No. 861, 76th Congress., 2nd Sess.) reads as follows:

> (2) If a permittee *or licensee* under the [Taylor Grazing] Act of June 28, 1934 (48 Stat. 1269), enters military service, he may elect to suspend his permit *or license* for the period of his military service and six months thereafter, and the Secretary of the Interior by regulations shall provide for *such* suspension of permits *and licenses* and for the *remission, reduction, or refund of grazing fees* during such suspension. [Italics added.]

Both permits *and licenses* are recognized by this Act. Since the only licenses issued under the Taylor Grazing Act are those provided for in the regulations here in question, this statute is unequivocal ratification by Congress of these regulations.

The court below seems to have found some merit in the Government's ratification argument, but for reasons which are not quite clear concluded that the ratification was ineffective (R. 57). In so holding, the court below erred. That Congress, under its power to make all needful rules and regulations respecting the public land, could have expressly provided for a temporary license and fee system must

be conceded. *Sinclair* v. *United States*, 279 U. S. 263, 294, 297; *Light* v. *United States*, 220 U. S. 523, 536–537. What Congress can authorize, it can, of course ratify. *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8, 11; *Hodges* v. *Snyder*, 261 U. S. 600, 602, 603; *Swayne & Hoyt Ltd.* v. *United States*, 300 U. S. 297, 302. And it is well settled that such ratifying legislation is applicable and may be given retroactive effect by the appellate court even though it may have been enacted after the court of first instance passed upon the administrative action involved. *United States* v. *Schooner Peggy*, 1 Cranch 103, 110; *Dinsmore* v. *Southern Express Co. &c.*, 183 U. S. 115, 120; *Tiaco* v. *Forbes*, 228 U. S. 549, 556; Cf. *Vandenbark* v. *Owens-Illinois Glass Co.*, No. 141, this Term.

CONCLUSION

The decision below should be reversed, and the Nevada courts should be directed to dismiss the complaint, either because of the want of jurisdiction and indispensable parties or because the complaint fails to state a cause of action.

Respectfully submitted.

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APRIL 1941.

APPENDIX

Pertinent provisions of the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269, as amended by the Act of June 26, 1936, c. 842, 49 Stat. 1976 (43 U. S. C., Supp. V, sec. 315 *et seq.*):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of one hundred and forty-two million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided,* That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. * * * Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attend-

ance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however,* That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement. Nothing in this Act shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district.

SEC. 2. The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the Secretary of the Interior is authorized to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate the areas

subject to the provisions of this Act, through such funds as may be made available for that purpose, and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500.

SEC. 3. That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time: *Provided,* That grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such

permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: *Provided further,* That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands.

* * * * *

SEC. 5. That the Secretary of the Interior shall permit, under regulations to be prescribed by him, the free grazing within such districts of livestock kept for domestic purposes; and provided that so far as author-

ized by existing law or laws hereinafter enacted, nothing herein contained shall prevent the use of timber, stone, gravel, clay, coal, and other deposits by miners, prospectors for mineral, bona fide settlers and residents, for firewood, fencing, buildings, mining, prospecting, and domestic purposes within areas subject to the provisions of this Act.

* * * * * *

SEC. 10. That, except as provided in sections 9 and 11 hereof, all moneys received under the authority of this Act shall be deposited in the Treasury of the United States as miscellaneous receipts, but 25 per centum of all moneys received under this Act during any fiscal year is hereby made available, when appropriated by the Congress, for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements, and 50 per centum of the money received under this Act during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which the grazing districts or the lands producing such moneys are situated, to be expended as the State Legislature of such State may prescribe for the benefit of the county or counties in which the grazing districts or the lands producing such moneys are situated: *Provided*, That if any grazing district or any leased tract is in more than one State or county, the distributive share to each from the proceeds of said district or leased tract shall be proportional to its area in said district or leased tract.

* * * * * *

SEC. 15. The Secretary of the Interior is further authorized, in his discretion, where

vacant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands for grazing purposes, upon such terms and conditions as the Secretary may prescribe: *Provided*, That preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, except that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary.

* * * * *

SEC. 17. The President shall have power, with the advice and consent of the Senate, to select a Director of Grazing. The Secretary of the Interior may appoint such Assistant Directors and such other employees as shall be necessary to administer this Act. The Civil Service Commission shall give consideration to the practical range experience in public-land States of the persons found eligible for appointment by the Secretary as Assistant Directors or graziers. No Director of Grazing, Assistant Director, or grazier shall be appointed who at the time of appointment or selection has not been for one year a bona fide citizen or resident of the State or of one of the States in which such Director, Assistant Director, or grazier is to serve.

Pertinent provisions of the Grazing Regulations of March 2, 1936 (R. 23–27):[1]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
DIVISION OF GRAZING
Washington

RULES FOR ADMINISTRATION OF GRAZING DISTRICTS

(Under the act of June 28, 1934 (48 Stat. 1269), commonly known as the Taylor Grazing Act)

Permits within the meaning of section 3 of the act of June 28, 1934 (48 Stat. 1269), shall be issued as soon as the necessary data are available upon which to ascertain the proper use of the lands and water which entitle their owners, occupants or lessees to a preferential grazing privilege.

During the intervening period, temporary licenses will be issued under authority of section 2 of said act to provide for the existing livestock industry using the public lands in such districts.

Licenses

Licenses issued in 1936 will be operative only during that year or for such part of 1937 as may be considered the "winter grazing season" as determined by local usage, but in no event will extend beyond May 1, 1937.

[1] These regulations have been amended from time to time, but the changes do not affect the legal problems here involved. The current regulations are to be found in 43 Code of Federal Regulations, secs. 501 *et seq.*

Such licenses will be revocable for viol
tion of the terms thereof and will termina
on the issuance of permits in a district.

An applicant for a grazing license is qua
ified if he owns livestock and is:

1. A citizen of the United States of Ame
ica or one who has filed his declaration
intention to become such, or

2. A group, association or corporation a
thorized to conduct business under the lav
of the State in which the grazing district
located.

The following definitions will be used i
issuing licenses only:

Property shall consist of land and it
products or stock water owned or controlle
and used according to local custom in live
stock operations. Such property is:

(a) *"Dependent"* if public range is re
quired to maintain its proper use.

(b) *"Near"* if it is close enough to be use
in connection with public range in usual an
customary livestock operations. In case th
public range is inadequate for all the nea
properties, then those which are nearest i
distance and accessibility to the public rang
shall be given preference over those not s
near.

(c) *"Commensurate"* for a license for
certain number of livestock if such propert
provides proper protection according to loca
custom for said livestock during the perio
for which the public range is inadequate.

Priority of use.—Is such use of the publi
range before June 28, 1934, as local custo
recognized and acknowledged as a prope
use of both the public range and the land
or water used in connection therewith.

Issuance of licenses

After residents within or immediately adjacent to a grazing district having dependent commensurate property are provided with range for not to exceed ten (10) head of work or milch stock kept for domestic purposes, the following named classes, in the order named, will be considered for licenses:

1. Qualified applicants, with dependent commensurate property with priority of use.
2. Qualified applicants with dependent commensurate property but without priority of use.
3. Qualified applicants who have priority of use but not commensurate property.
4. Other qualified applicants.

Licenses will be issued in the above-named order of classes until the carrying capacity of the public range shall be attained. If a class more than exhausts the capacity of the range, all junior classes will be eliminated, and cuts within the last-recognized class shall be made by reduction of numbers or limitation of seasonal use until the number equal to the fixed carrying capacity of the public range is reached.

Fees

A grazing fee of five (5) cents per head per month or fraction thereof, for each head of cattle or horses and one (1) cent per month, or fraction thereof, for each sheep or goat shall be collected from each licensee except free-use licenses.[2]

* * * * *

[2] Cf. 43 Code of Federal Regulations, sec. 501.16.

General Rules of the Range

The following rules shall supersede all previous rules heretofore promulgated for grazing districts created under the act of June 28, 1934 (48 Stat. 1269), and shall be operative in all grazing districts in the States of Arizona, California, Colorado, Idaho, Oregon, Montana, Nevada, New Mexico, Utah, and Wyoming.

The following acts are prohibited on the lands of the United States in said grazing districts under the jurisdiction of the Division of Grazing of the Department of the Interior:

1. The grazing upon or driving across any public lands within said grazing districts of any livestock without a license.

2. Grazing upon or driving across said grazing district lands of any livestock in violation of the terms of a license.

3. Allowing stock to drift and graze on said district lands without a license.

4. Constructing or maintaining any kind of works, structure, fence, or inclosure without authority of law or license.

5. Destroying, molesting, disturbing, or injuring property used, or acquired for use, by the United States in the administration of grazing districts.

The following rules for fair range practice will be complied with by all licensees within said grazing districts:

1. All licenses will comply with the laws of the State within which the grazing district is located in regard to the number and kind of bulls turned on the range.

2. Crossing licensees shall follow the route prescribed in the crossing license, at a rate of not less than five (5) miles per day for sheep or goats and ten (10) miles per day for cattle and horses.

Procedure for Enforcement of Penalties for Violation of the Rules and Regulations

Section 2 of the act of June 28, 1934 (48 Stat. 1269), commonly known as the Taylor Grazing Act, provides that "any wilful violation of the provisions of this act" or of "rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500."

* * * * *

The foregoing rules for administration of grazing districts shall be effective immediately as to all grazing districts now established and to all new grazing districts when established and they supersede Division of Grazing Circulars Nos. 1, 2, 4, and 6 heretofore issued.

F. R. CARPENTER,
Director of Grazing.

Approved March 2, 1936.

HAROLD L. ICKES,
Secretary of the Interior.

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